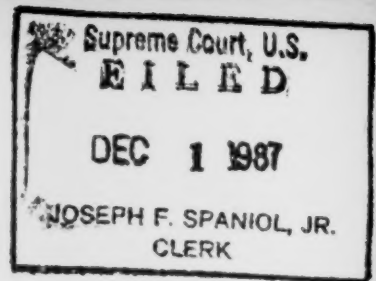


NO.  
87-703



IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1987

WILFRIED VAN CAUWENBERGHE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, NATIONAL  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,  
IN SUPPORT OF THE GRANT OF  
A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DO THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PERMIT THE GOVERNMENT TO SEIZE PRIOR TO TRIAL, AND THEREAFTER TO RETAIN, A DEFENDANT'S PRIVATE PROPERTY THAT IS UNRELATED TO ANY OFFENSE AND IS NEEDED TO PAY COUNSEL TO DEFEND AGAINST CRIMINAL CHARGES?

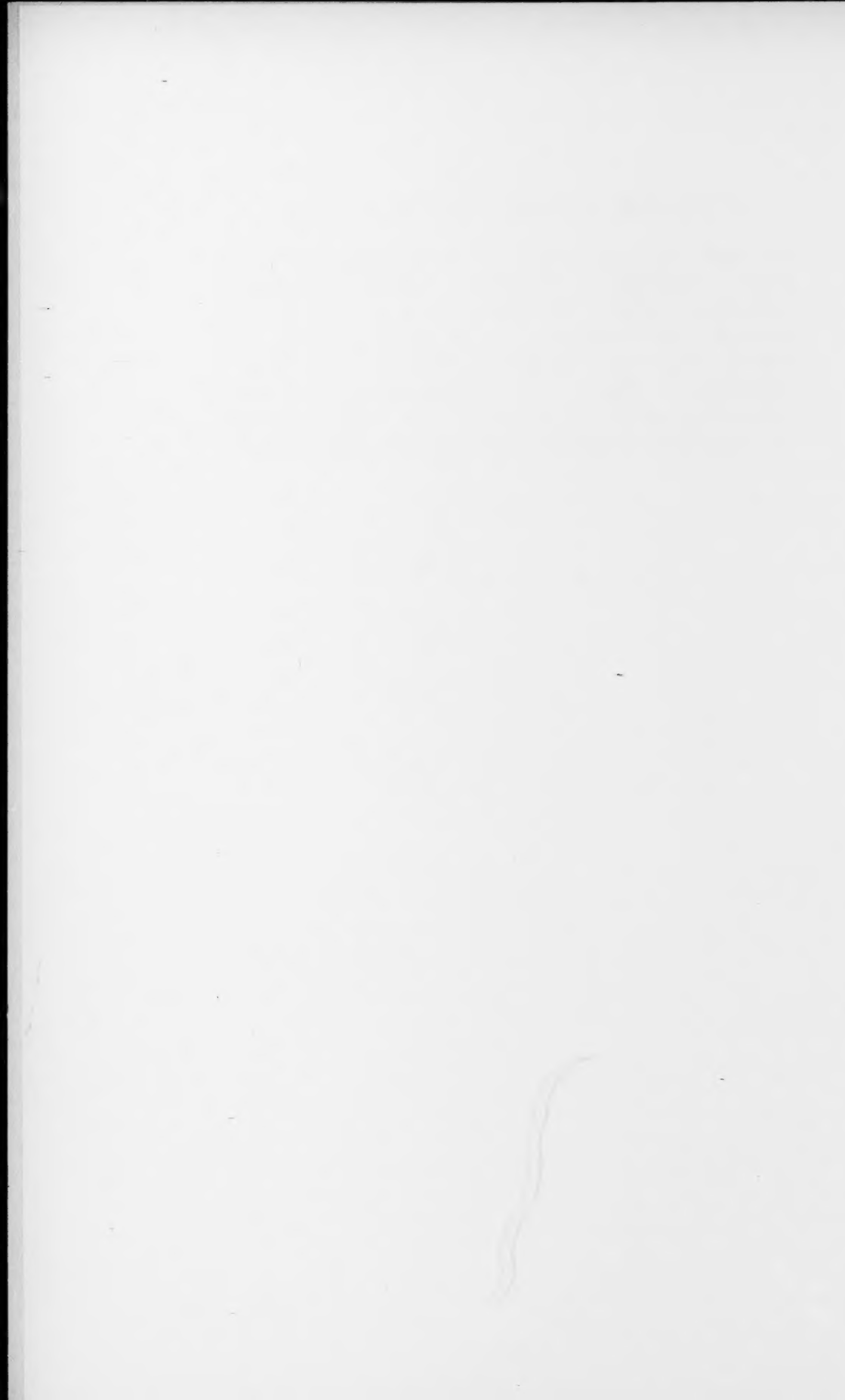


TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW . . . .	i
TABLE OF CONTENTS . . . . .	ii
TABLE OF AUTHORITIES. . . . .	iii
INTEREST OF AMICUS. . . . .	2
SUMMARY OF THE ARGUMENT . . . . .	4
REASONS FOR GRANTING THE WRIT . . . .	12

ALLOWING THE GOVERNMENT TO  
SEIZE PRIVATE PROPERTY  
PRIOR TO TRIAL AND  
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SAME PROPERTY WHICH IS  
UNRELATED TO THE CHARGED  
CRIMINAL OFFENSE AND IS  
NEEDED TO PAY COUNSEL  
VIOLATES THE FIFTH AND  
SIXTH AMENDMENTS TO THE  
UNITED STATES CONSTITU-  
TION.

CONCLUSION . . . . .	43
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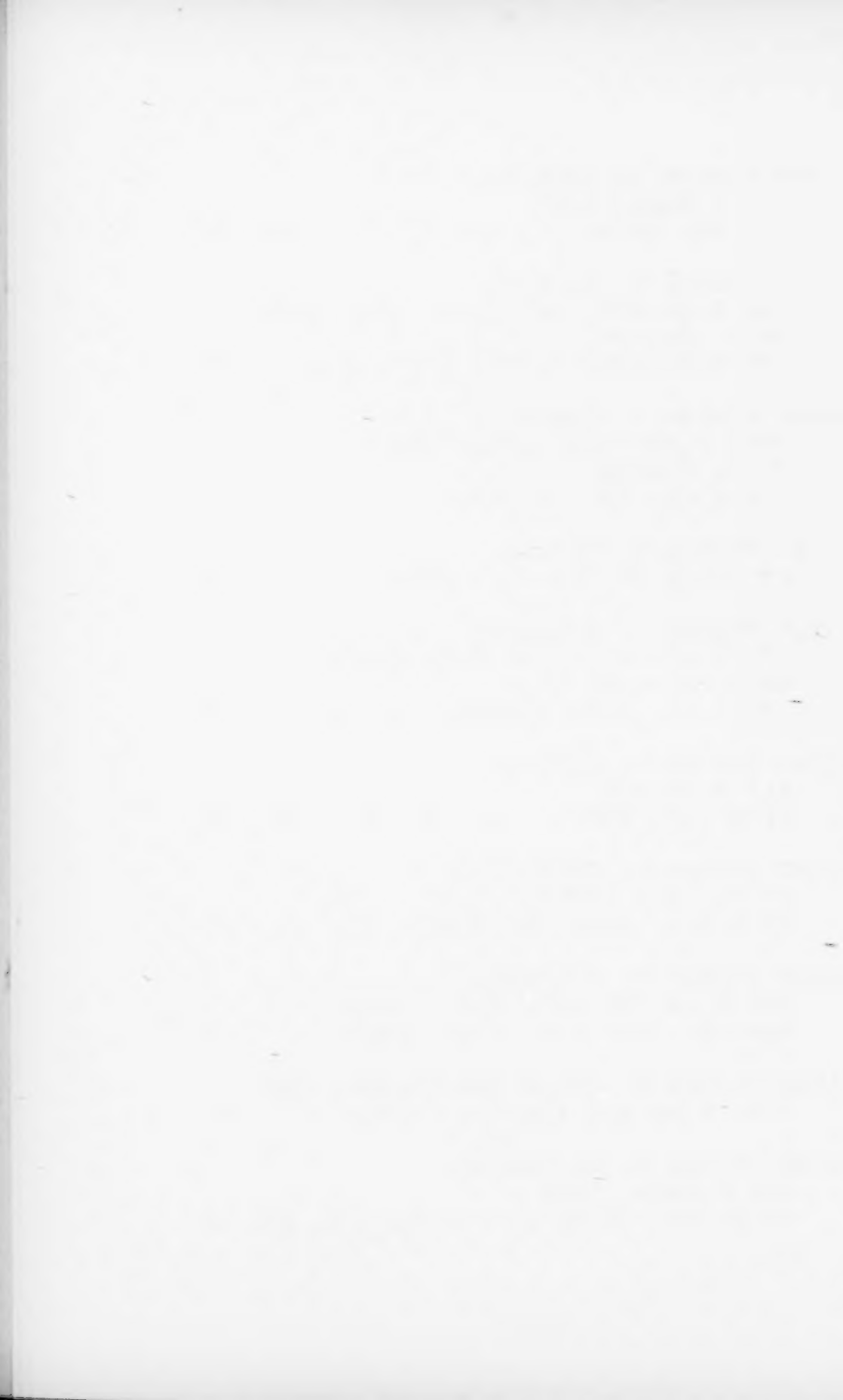
## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Cuyler v. Sullivan, 446 U.S. 335 (1980) . . . . .	30
Estelle v. Williams, 425 U.S. 501 (1976) . . . . .	39
Herring v. New York, 422 U.S. 853 (1975) . . . . .	39
In re Winship, 397 U.S. 358 (1970) . . . . .	40
Payden v. United States, 605 F.Supp. 839, (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985) . . .	17
Powell v. Alabama, 287 U.S. 45 (1932) . . . . .	39
Russello v. United States, 464 U.S. 16, 104 S.Ct. 296 (1983) . . . . .	22
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) . . . . .	28
United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984) . . . . .	27, 39
United States v. \$10,694, 828 F.2d 233 (4th Cir. 1987) . .	37
United States v. Badalamenti, 614 F.Supp. 194 (S.D.N.Y. 1985) .	26





United States v. Bassett, 632 F.Supp. 1308 (D. Md. 1986) . . . . .	26, 31
United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) . . . . .	28
United States v. Conner, 752 F.2d 566 (11th Cir.), cert. denied, 106 S.Ct. 725 (1985) . . . . .	15
United States v. Curcio, 694 F.2d 14 (2d Cir. 1982) . . . .	28
United States v. Ginsburg, 773 F.2d 798, (7th Cir. 1985), cert. denied, 106 S.Ct. 1186 (1986). . . . .	17
United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) . . . . .	21, 30
United States v. Ianniello, 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985) . . . . .	25
United States v. L'Hoste, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980) . . .	15
United States v. Lizza Industries, Inc., 775 F.2d 492 (2d Cir. 1985) . . .	15
United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1976) . . . . .	21, 23, 26, 32



United States v. Rogers, 602 F.Supp. 1332 (D. Colo. 1985) . . . . .	20, 22
---	--------

United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), on rehearing 809 F.2d 249 (5th Cir. 1987) . . . . .	35
---	----

United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir 1987) . . .	13
---	----

**Constitutional Provisions and Statutes**

United States Constitution	
Fifth Amendment . . . . .	12
Sixth Amendment . . . . .	12
18 U.S.C. §§ 1961-1968 . . . . .	15
18 U.S.C. §1963 . . . . .	16
21 U.S.C. §§848, 853 . . . . .	15
28 U.S.C. §2255 . . . . .	32

**Other Authorities**

Cloud, Forfeiting Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights, 1987 Wisconsin L.Rev. 1 (1987). .	24
---	----

Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs? 39 Sw.L.J. 1067 (1986) . . . . .	8, 27
---	-------



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Genego, Risky Business: The Hazards of Being A Criminal Defense Lawyer, 1 Criminal Justice 2 (Spring 1986) . . . . .	24
Mass, Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of Crime"? 39 Stan.L.Rev. 663 (1987) . . .	14, 24
Miami Review 1 (July 31, 1986) . . . .	27
Model Code of Professional Responsibility DR 2-101 . . . . . DR 2-110 . . . . .	25
Rachner, Against Forfeiture of Attorneys' Fees under RICO: Protecting the Constitutional Rights of Criminal Defendants, 61 N.Y.U.L.Rev. 124 (1986) . . . .	8
Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am.Crim.L.Rev. 747 (1985) . . .	15



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### INTEREST OF AMICUS 1/

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership comprised of more than 5,000 lawyers and law professors from every state, most of whom are engaged actively in defending criminal prosecutions and protecting individual rights. NACDL was founded 26 years ago to promote the study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers and criminal justice professionals. Throughout NACDL's history, its members have

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1/ Both Petitioner and Respondent have consented to the filing of this brief. The letters of consent will be forwarded to the Clerk.



worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair and proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights, the improvement of the criminal law, and the preservation of the integrity, independence, and competence of the defense lawyer in criminal cases.

The broad issue raised in this case involves the pretrial seizure and restraint, and the potential for forfeiture of assets which an accused in a criminal case desired to use to retain counsel to defend him. Such practices by the government, which have the effect of separating a defendant from the only means whereby criminal charges can be fought, threaten fifth and sixth amendment rights of persons accused of crimes and tear at



the very fabric of our adversary system of criminal justice. Resolution of this asset seizure issue has a profound impact upon the administration of criminal justice in the courts and, therefore, upon the members of NACDL. Because the right to counsel and the preservation of an adversarial system of criminal justice are matters central to the administration of justice, NACDL has moved for leave to file this brief as amicus curiae solely to assist the Court in resolving this important issue.

#### SUMMARY OF THE ARGUMENT

Succinctly stated, this case raises the issue of a court's power to deprive a criminal accused of legitimately earned assets which are needed to pay defense counsel and the expenses associated with a defense to criminal charges. Although the case arises out of a claim of a court's



inherent authority to hold a defendant's assets for ultimate forfeiture or for the guarantee of restitution to a victim, the result reached in the case applies to any type of pretrial asset seizure in criminal cases. The consequences of the seizure and restraint approved by the Ninth Circuit have a profound effect on the workings of the criminal justice system. The Ninth Circuit unnecessarily has compromised an accused's constitutional rights to effective assistance of counsel, to due process, and to fundamental fairness, in a manner which conflicts with virtually every reported appellate decision on the subject of seizure and forfeiture of assets needed to pay legal fees. The Ninth Circuit decision will have serious and far reaching ramifications for the criminal justice system.





The pretrial seizure and retention of an accused's assets, especially those which are unconnected to any criminal activity, raise serious constitutional questions. When untainted assets are needed by an accused to retain counsel and pay legal fees to defend against criminal charges, the constitutional question becomes even more pronounced. Until criminal charges against an accused are resolved, and the property which is subject to seizure or forfeiture is determined to be derived from illegal conduct, the accused should not be made to suffer from an inability to use assets to pay counsel for the purpose of mounting a vigorous defense. Every accused has the right to a meaningful defense and the assistance of counsel to pursue defenses, no matter how serious the criminal allegations. This right becomes nothing



but an illusion if an accused can be separated from assets prior to a judicial determination of guilt, and thus can be denied the right to use assets for defense purposes.

The rendering of legitimate legal services to a criminal accused is entirely consistent with constitutional interests, and is a right which must be protected. That right was abandoned by the Ninth Circuit in the case under review, in a manner which does substantial injustice to the criminal justice system. Certiorari review by this Court is needed to correct this imbalance in the law.

Within the framework of our justice system, the pretrial separation of an accused from assets can occur in several ways. The most frequently occurring method is through statutory seizure and forfeiture. The Comprehensive Forfeiture



Act of 1984<sup>2/</sup> contains forfeiture provisions which vest in the government the title to property derived from criminal conduct from the time of an accused's unlawful acts. This "relation back" doctrine is a vehicle by which government authorities argue that an accused cannot transfer assets to a third party because the assets become the property of the government at the moment of the criminal activity. This statute has been the subject of recent judicial examination. The propriety of seizure and forfeiture

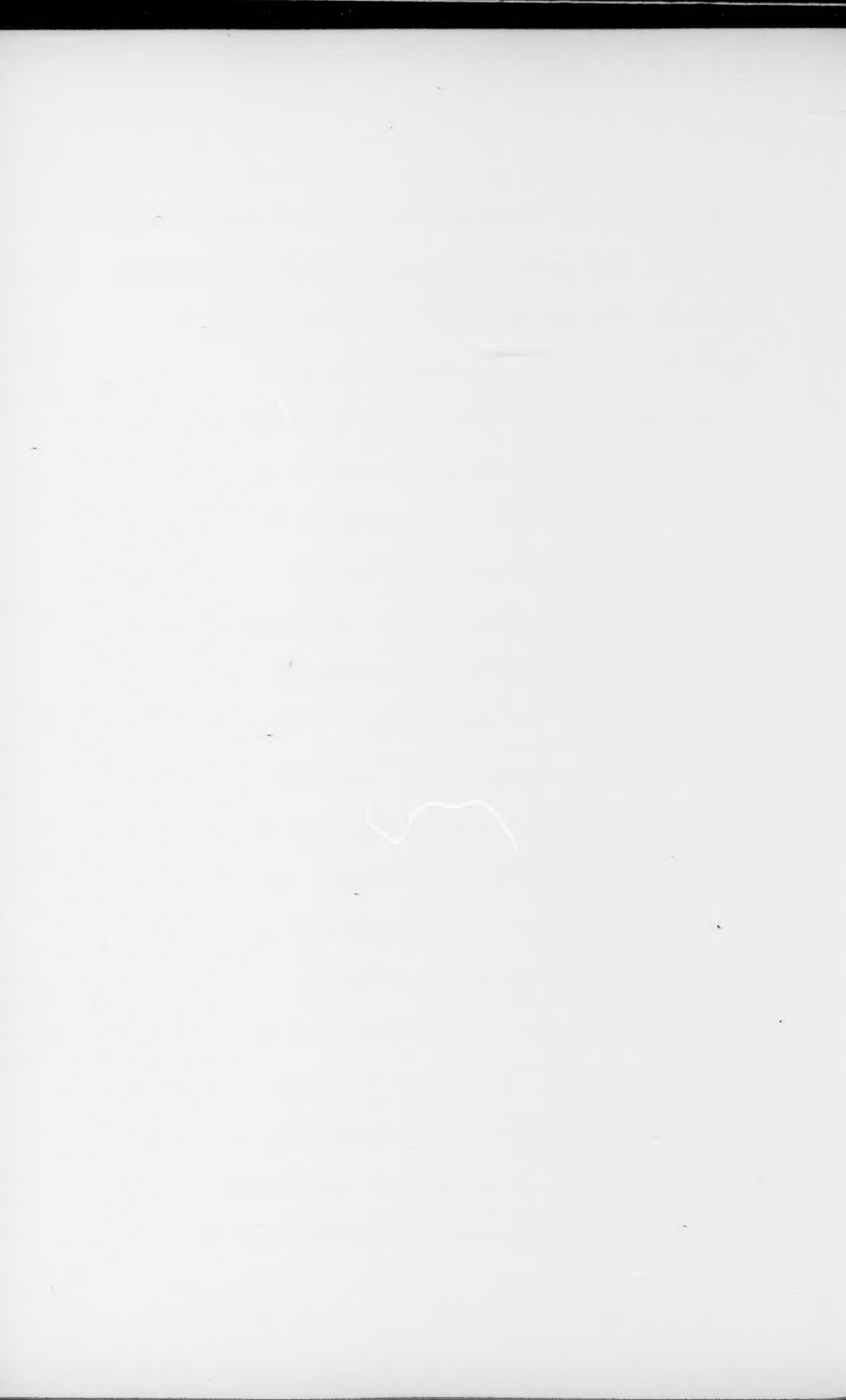
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<sup>2/</sup> The Comprehensive Forfeiture Act was enacted as Chapter III of the Crime Control Act of 1984. P.L. No. 84-873, §§301-322, 98 Stat. 1837 (1984). The Act amended existing provisions of the RICO and CCE statutes an attempt to make them more effective. See Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs? 39 Sw.L.J. 1067, -1068 n.10 (1986); Rachner, Against Forfeiture of Attorneys' Fees under RICO: Protecting the Constitutional Rights of Criminal Defendants, 61 N.Y.U.L.Rev. 124, 125-126 (1986).



under the CFA requires a careful balancing of an accused's constitutional rights against the government interest in holding assets for ultimate forfeiture.

Another approach to property seizure and forfeiture, the one used in this case, involves a taking of property based on a court's inherent authority to hold property for forfeiture purposes, even when the property concededly is not derived from criminality. The initial justification for the taking, that a court possesses authority to deprive a criminal defendant of access to lawfully owned property, is suspect, since due process protections severely limit the power of a court to deprive a person of property. But, even if a court has such power, that authority cannot be so broad as to prevent a criminal defendant from using assets to retain counsel and defend





against the charges. In either approach, the pretrial seizure of property, without a judicial determination of an accused's guilt beyond a reasonable doubt and a finding that a valid basis exists for forfeiture, compromise the accused's constitutional guarantee of the right to the assistance of counsel and fundamental fairness.

The Ninth Circuit decision for which review is sought authorizes a seizure of an accused's assets, even when that seizure has been shown to compromise the accused's ability to retain counsel to pursue an aggressive and vigorous defense. This authority granted to the government to seize and retain assets, without any guidelines for judicial review, conflicts with recent decisions of other federal courts, and results in such uncertainty in the application of the forfeiture laws



that this Court should resolve the conflict and clarify the ambiguity. The forfeiture authority of the courts is an integral facet of the criminal justice system. To be effective, the forfeiture laws must be uniform throughout the criminal justice system. That necessary uniformity is nonexistent now, in view of the conflicting decision of the Ninth Circuit.

The view of asset seizure and forfeiture approved by the Ninth Circuit works a serious injustice to a criminal accused who intends to challenge the prosecution's charges. The interpretation successfully pressed by the government tears at the very fabric of our adversarial system of criminal justice. The decision of the Ninth Circuit violates precedent, is inconsistent with the meaning of pretrial seizure and forfeiture laws, and runs



afoul of the constitutional guarantees to the assistance of counsel, due process, and fundamental fairness. The application of pretrial seizure, restraint, and forfeiture laws should be uniform throughout the criminal justice system. Because the Ninth Circuit's decision promotes disharmony within the system, this Court should grant certiorari review to resolve the now-existing conflict.

REASONS FOR GRANTING THE WRIT

ALLOWING THE GOVERNMENT TO SEIZE PRIVATE PROPERTY PRIOR TO TRIAL AND THEREAFTER TO RETAIN THAT SAME PROPERTY WHICH IS UNRELATED TO THE CHARGED CRIMINAL OFFENSE AND IS NEEDED TO PAY COUNSEL VIOLATES THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The power of the government to seize an accused's assets, and the authority of a court to deprive the accused of access to those assets, even when needed to pay



legal fees, are issues of considerable concern to the criminal justice system. Resolution of these issues by the lower courts has been nearly uniform, with the general rule that pretrial seizure and deprivation of assets cannot be effected in so broad a manner that an accused is denied access to funds needed to defend against criminal charges. Those decisions, whether resolved on the basis of constitutional analysis or statutory construction, recognize that a delicate balance was required to insure that an accused not be deprived of the minimum requisites to challenge government authority. In United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir 1987), the Ninth Circuit altered this constitutionally sound approach, and permitted the unbridled seizure of assets and deprivation of an accused's access to



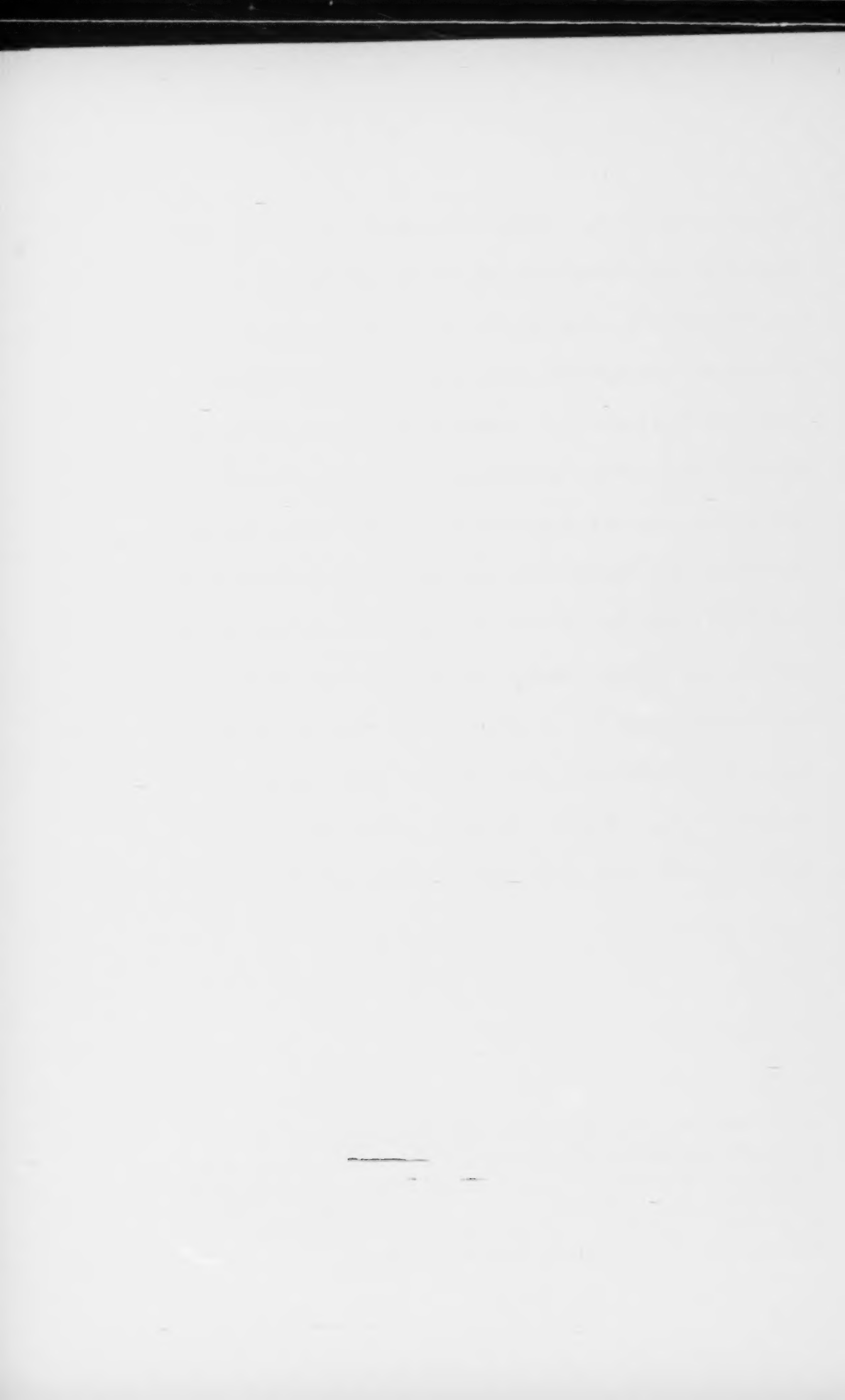


those assets, notwithstanding the accused's substantial showing of need.

Criminal seizure of an accused's personal property for purposes of obtaining forfeiture of assets derived from or used in the commission of criminal activity is of relatively recent vintage. Present day pretrial property seizures and forfeitures in criminal cases essentially began in 1970, when Congress enacted two laws designed to combat what was viewed as the pervasive influence of organized crime.<sup>3/</sup> Both laws, the Racketeer Influenced and Corrupt Organizations Act

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<sup>3/</sup> Mass, Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of Crime"? 39 Stan.L.Rev. 663, 664-668 (1987) (historical overview of criminal forfeiture provisions).



(RICO)<sup>4/</sup> and the Continuing Criminal Enterprise statute (CCE),<sup>5/</sup> contain provisions permitting the forfeiture of property belonging to a convicted defendant.<sup>6/</sup> The enactment of these laws was

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<sup>4/</sup> 18 U.S.C. §§ 1961-1968. Organized Crime Control Act of 1970, §901(a), Pub.L. 81-452, 84 Stat. 922.

<sup>5/</sup> 21 U.S.C. §848. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, Pub.L. 91-513, 84 Stat. 1236.

<sup>6/</sup> A criminal forfeiture is an in personam penalty against the defendant, and functions as a punishment imposed on a guilty defendant. United States v. Lizza Industries, Inc., 775 F.2d 492, 498 (2d Cir. 1985); United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied, 106 S.Ct. 725 (1985). See Russello v. United States, 464 U.S. 16, -104 S.Ct. 296 (1983) (discussion of criminal forfeiture pursuant to the RICO Act). This penalty differs from the typical in rem forfeiture, which proceeds against the property itself as the offender. United States v. L'Hoste, 609 F.2d 796, 813 n.15 (5th Cir.), cert. denied, 449 U.S. 833 (1980). See Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am.Crim.L.Rev. 747 (1985) (examination of civil versus criminal forfeiture laws).



necessary because there is no inherent authority to seize or forfeit an accused's property, a point which escaped the Ninth Circuit in the decision below.

Congress stiffened the RICO and CCE pretrial seizure and forfeiture provisions in 1984. Even with the strengthened statutes, seizures and forfeitures of a defendant's assets were not permitted to violate constitutional protections. The principal thrust of the amendments, contained within the Comprehensive Forfeiture Act of 1984, was that legal ownership to property derived from unlawful activity vests in the government at the time of the criminal act. 18 U.S.C. §1963(c); 21 U.S.C. §853(c). This concept, known as the "relation back" doctrine, authorizes the government to request that a court void post-crime third-party transfers of defendant's

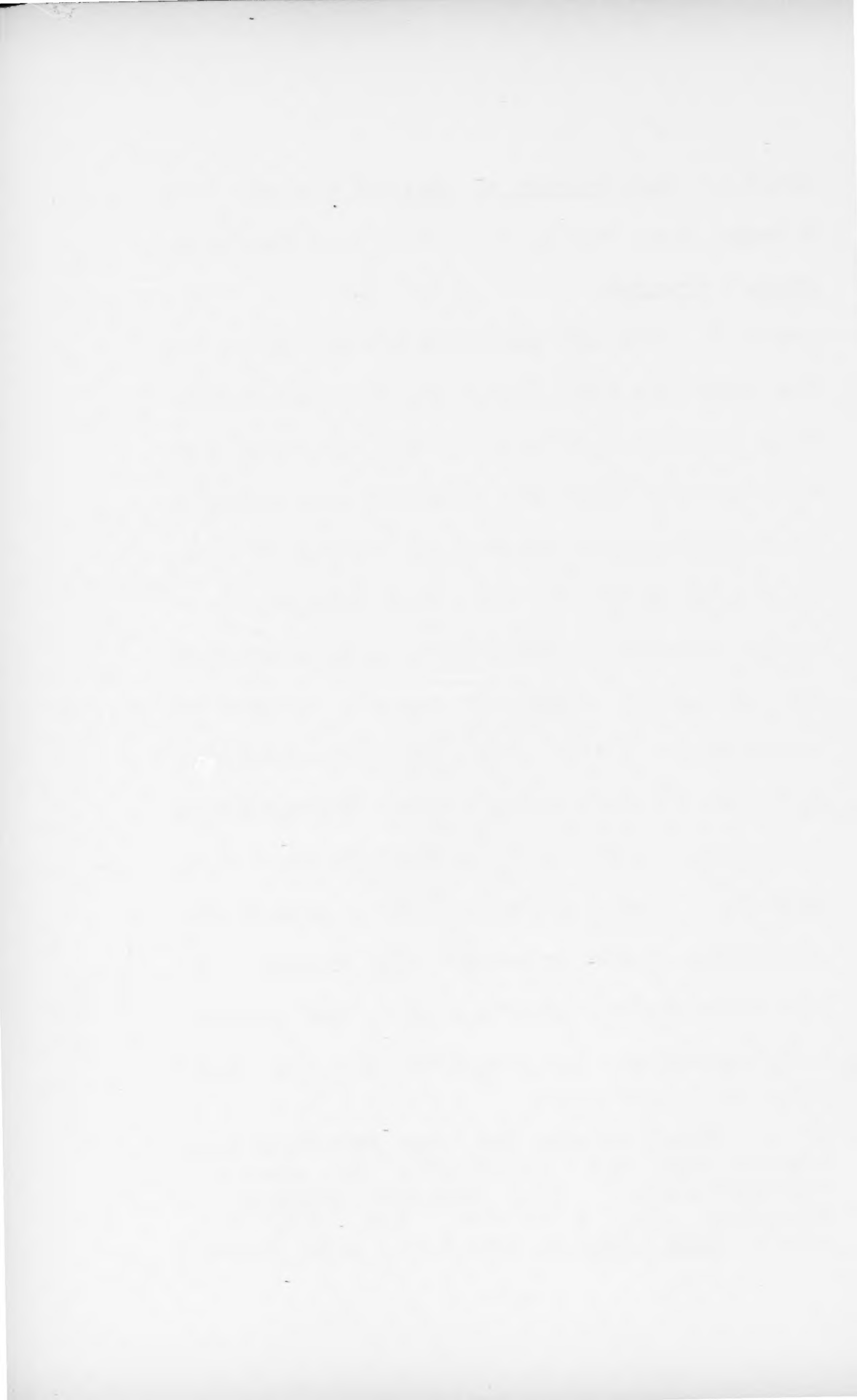


assets. See Payden v. United States, 605 F.Supp. 839, 849 n.14 (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985).<sup>7/</sup> The CFA provides an exception to the relation back doctrine, in that a bona fide purchaser without actual or constructive notice that the property was subject to forfeiture is allowed to acquire title. 18 U.S.C. §1963(c); 21 U.S.C. §853(c).

To prevent a defendant from disposing of illegally acquired assets prior to conviction, the CFA permits pretrial orders restraining the defendant's property. 18 U.S.C. §1963(e); 21 U.S.C. §853(e). The issuance of a broad restraining order prevents any transfer of the defendant's assets until the forfeiture question is resolved at the con-

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<sup>7/</sup> Prior to the CFA, the relation back theory was not applicable to criminal forfeitures. See United States v. Ginsburg, 773 F.2d 798, 800 (7th Cir. 1985), cert. denied, 106 S.Ct. 1186 (1986).





clusion of the criminal trial. In the interim, the defendant can be denied access to the restrained assets, but only upon a substantial showing of good cause.

The inherent conflict in the application of pretrial seizure and forfeiture authority is that found in the present case: can an accused be separated from legitimately owned assets prior to a determination of guilt, even when those assets are needed to support a defense to criminal allegations? The courts which have considered this question have largely concluded that the Constitution requires that a balance be struck, and that otherwise lawful government aims cannot usurp an accused's right to counsel. It is in this regard that the Ninth Circuit failed to pay heed to the priorities protected by the Constitution. This is



the conflict which must be resolved by this Court.

The essential friction between government interests and individual rights found in this case is that which pits a defendant's right to an aggressive defense against the government's interest in holding property for ultimate forfeiture or to satisfy conditions of a defendant's sentence, such as the payment of a fine or restitution. The laudable government purpose of protecting assets against wrongful transfer or waste cannot be elevated to an absolute requirement, when those very assets are needed to insure a defendant's right to the effective assistance of counsel. It makes no difference from a constitutional perspective whether the property restraint stems from a statutory enactment or from judicial approval, since the restriction



on the right to counsel is just as evident. In failing to recognize this impermissible restriction, the Ninth Circuit failed to reconcile its decision with analogous opinions of other courts.

An early analysis of government action toward attorney fee forfeitures occurred in United States v. Rogers, 602 F.Supp. 1332, 1348 (D. Colo. 1985), where the court announced that whenever a property seizure clashes with a defendant's sixth amendment right, the property seizure must give way:

An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered.

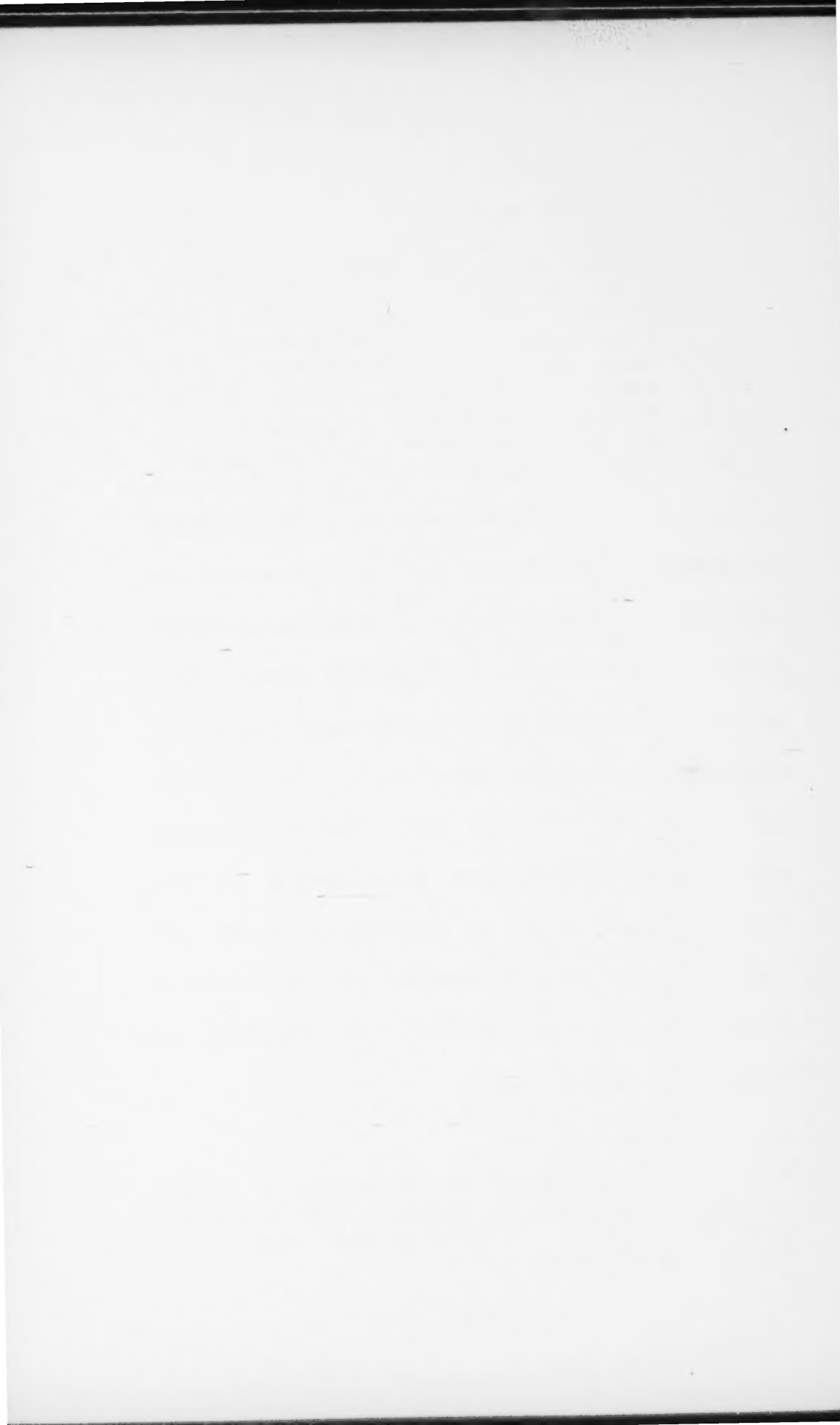


Congress did not intend to include in those items forfeitable the compensation already paid for goods and services legitimately provided. This does not, however, mean that assets transferred to a lawyer as part of a sham will not be subject to forfeiture.

Using this analysis, a forfeiture grounded on statutory authority cannot be applied so broadly as to preclude arrangements for the payment of legal fees. This point was underscored in United States v. Reckmeyer, 631 F.Supp. 1191, 1196 (E.D. Va. 1976),<sup>8/</sup> finding that the philosophy behind the forfeiture provisions of the CFA -- separating a defendant from illegitimately earned assets -- is actually furthered by permitting the payment of bona fide legal fees:

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<sup>8/</sup> The Reckmeyer decision was affirmed in United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), which is now pending on rehearing en banc.





In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. See S.Rep. 98- 225 at 191; see also Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 299 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. See S.Rep. 98-225 at 209 n.47. Exempting legitimate attorney's fees from forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham," United States v. Rogers, 602 F.Supp. at 1348, and therefore a defendant who is found guilty will still be separated



completely from his  
economic base.

See also United States v. Reckmeyer, 628  
F.Supp. 616 (E.D. Va. 1986) (post-convic-  
tion forfeiture does not bar repayment of  
legitimate debt).

The very potential for fee re-  
straints in connection with property  
seizures has a negative impact on the  
adversary system of justice, an effect not  
envisioned by the Ninth Circuit in its  
decision below. Pretrial restraints and  
fee forfeiture may force the withdrawal or  
disqualification of defense counsel for  
financial, ethical, and professional  
reasons. Pretrial restraints and ultimate  
fee forfeiture serve to allow the govern-  
ment to force the services of court-ap-  
pointed counsel on the defendant at the  
government's discretion or otherwise to  
limit the resources available to mount a  
defense to the government's allegations,



as occurred in this case. Pretrial restraining orders and fee forfeitures inhibit lawyers from accepting criminal defense work, because counsel may never be compensated for the work performed.<sup>9/</sup> Moreover, they risk violating ethical rules against accepting fees on a contingent basis.<sup>10/</sup>

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<sup>9/</sup> "Defending RICO accusations requires the marshalling of vast quantities of information and generally requires two to three years of representation during grand jury investigations." Mass, Rolls Royce of Attorneys, 39 Stan.L.Rev. at 675 n.74.

<sup>10/</sup> A research study conducted by Prof. William J. Genego of the University of Southern California Law Center concluded that prosecutorial practices such as attorney fee forfeitures and attorney subpoenas are increasing, at the risk of chilling the relationship between lawyer and client, and jeopardizing the availability of criminal defense practitioners. Genego, Risky Business: The Hazards of Being A Criminal Defense Lawyer, 1 Criminal Justice 2 (Spring 1986); Genego, Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense, 10 The Champion 7 (May 1986). Cloud, Forfeiting Attorney's Fees: Applying An Institutional Role Theory To  
(continued...)



In United States v. Ianniello, 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985) (Westlaw), then Chief Judge Constance Baker Motley concluded that laws permitting pretrial restraint of assets and ultimate forfeiture of funds needed to pay defense counsel could not encompass legitimate legal fees without risking insoluble constitutional conflict.

In the course of ruling on a motion to quash a grand jury subpoena, another court stated that the issue of property restraint and its impact on payment of legal fees "would raise such constitution-

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10/ (...continued)

Define Individual Constitutional Rights, 1987 Wisconsin L.Rev. 1 (1987). See also Model Code of Professional Responsibility DR 2-110(c). An attorney can withdraw from representation when the client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees," or if "[h]is continued employment is likely to result in a violation of a Disciplinary Rule." Id. DR 2-101(c)(1)(f), DR 2-110(c)(2).





al and ethical problems, I cannot conceive that this was intended by Congress, absent some indication in the statute or legislative history," and concluded that the possibility of fee forfeitures "would in all likelihood violate the Sixth Amendment." United States v. Badalamenti, 614 F.Supp. 194, 196 (S.D.N.Y. 1985). It is apparent, then, that the courts which have analyzed the issue of property seizures or restraints which restrict the payment of legal fees have concluded that assets needed to pay for bona fide attorneys fees are not forfeitable and should not be the subject of restraining orders. E.g., United States v. Bassett, 632 F.Supp. 1308 (D. Md. 1986); United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1986).<sup>11/</sup> The

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<sup>11/</sup> For a summary of the various district court rulings on asset restraints and fee forfeitures, see "Defense Attorneys Get Break," Miami Review at 1 (continued...)



conclusion is inescapable: the defendant's right to counsel, which is implemented through the ability to pay bona fide legal fees, should not be denied because of the government interest in seizing a defendant's assets.

The sixth amendment to the Constitution guarantees to an accused the right to be represented by counsel in all criminal cases. This right to counsel enables a defendant to implement all constitutional guarantees necessary for a fair trial. See United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 2044 (1984).<sup>12/</sup> The sixth amendment guarantees

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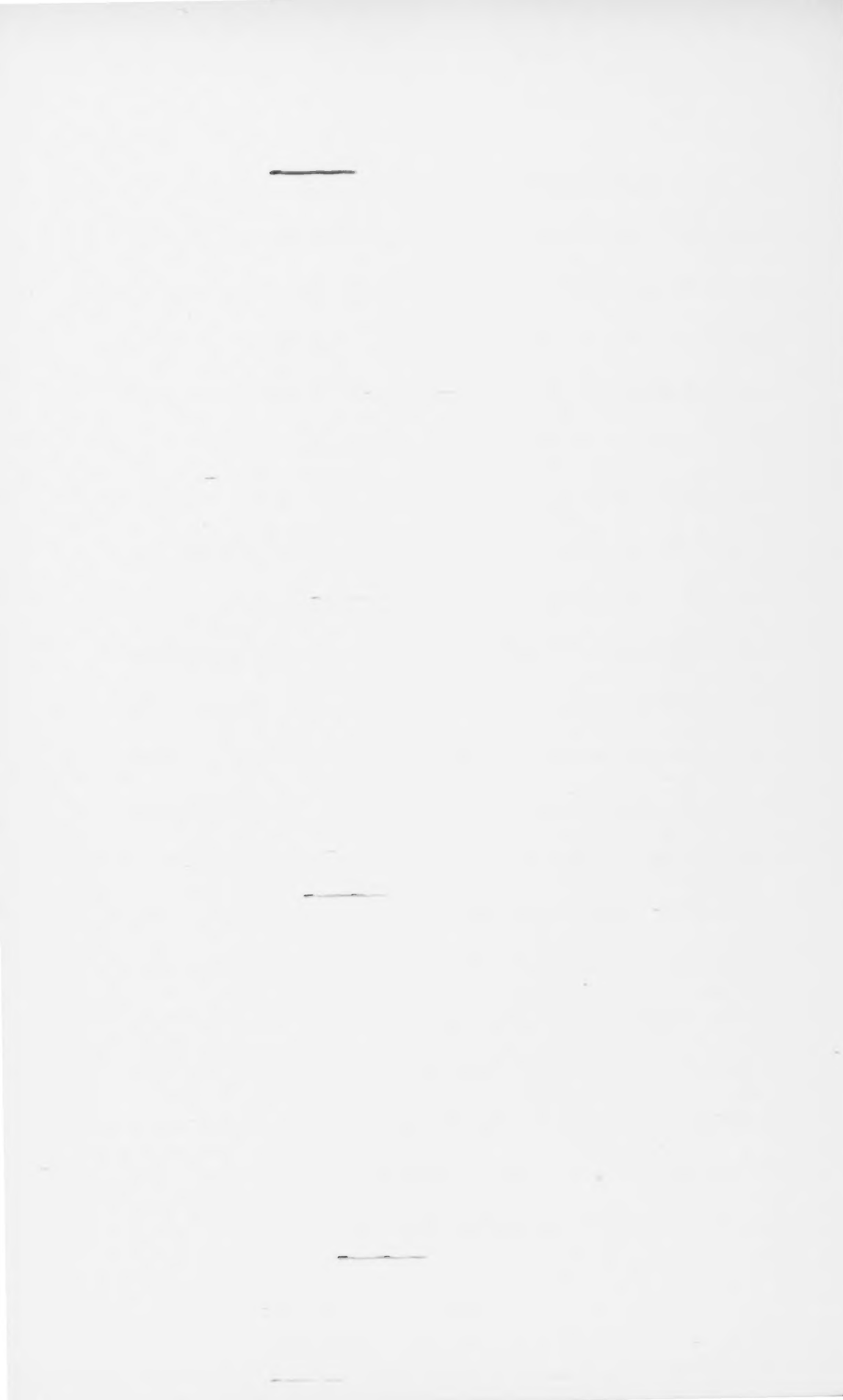
<sup>11/</sup> (...continued)  
(July 31, 1986); Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs? 39 Sw.L.J. 1067, 1079 n. 89 (1986).

<sup>12/</sup> The sixth amendment right to counsel includes the right to effective assistance of competent counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).



to a defendant a qualified right to counsel of choice if the defendant can afford counsel. E.g., United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

As this case illustrates, the right to choose counsel is of great practical significance. Here, the accused attempted to choose counsel to represent him in a complex criminal case. The retention of counsel decision necessarily encompassed the view that counsel would devise a complete defense strategy to fight the criminal charges. Because of the limitations imposed by the government's pretrial seizure and the court's pretrial order denying access to assets, the accused had no access to those assets needed for use in retaining counsel of his choice who



could mount a defense in the manner intended. That ruling itself requires an examination by this Court.

A defendant's constitutional right to present his defense through chosen counsel outweighs the government's financial interest in protecting a possible claim of title to property. Any other conclusion would elevate the government's monetary interests above the defendant's basic constitutional right to an effective defense. It is the potential for conviction and ultimate asset forfeiture that casts a negative gloss on the ability to retain counsel. The chosen lawyer is placed in an unnecessary environment of having to weigh effective representation against entitlement to legal fees. The government should not be able to place counsel in a position where personal interests and those of the client may





conflict. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (conflict of interest jeopardizes sixth amendment right to counsel). Sixth amendment interests can be effected only by removing all unnecessary hurdles to counsel's ethical dedication to the client's case.

The constitutional concerns have been resolved by other courts in favor of the position advanced by amicus curiae. The most recent appellate decision involving the application of pretrial seizure and restraining orders to assets needed to pay bona fide attorneys' fees for criminal defense representation is United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).<sup>13/</sup> During proceedings in the lower tribunal,

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<sup>13/</sup> Harvey involved a consolidated appeal of pretrial restraining and forfeiture orders in three separate cases. The Fourth Circuit granted rehearing en banc in one of the cases, in which attorneys fees were exempted from forfeiture.



the district court entered an ex parte pretrial order which restrained the defendant from using assets to pay legal fees to defense counsel, but used the Criminal Justice Act to appoint as counsel two members of the law firm which Harvey had wanted to retain. Harvey appealed his resulting conviction, raising the issue of the propriety of the pretrial restraining order. The Fourth Circuit consolidated Harvey's case with government appeals from district court orders in United States v. Bassett, 632 F.Supp. 1308 (D.Md. 1986), 14/

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14/ In United States v. Bassett, the court granted a pretrial injunction against a government threat of forfeiture of legitimate fees. The court held that "Congress did not intend the statute to encompass fees to attorneys paid for the legitimate rendering of professional services," for to do so would "violate Sixth Amendment principles." 632 F.Supp. at 1317-18.



and United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1986).<sup>15/</sup>

The Fourth Circuit affirmed Harvey's conviction, holding that the challenges of ineffective assistance of counsel caused by the restraining order were not the proper subject of a direct appeal. Those matters, instead, would have to be raised by collateral attack under 28 U.S.C. §2255. In so ruling, the Fourth Circuit held that Harvey's rights to procedural due process had been violated by the manner in which the asset freeze occurred. The court also upheld the orders in

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<sup>15/</sup> In United States v. Reckmeyer, the issue was raised by defense attorneys after a guilty plea and sentencing. The court held that forfeiture of bona fide fees violated the sixth amendment by impairing the defendant's right both to obtain counsel of choice and to the effective assistance of counsel. 631 F.Supp. at 1196-98. The government was directed to pay defense counsel out of the defendant's forfeited assets. 631 F.Supp. at 1198.



Bassett and Reckmeyer, which had exempted bona fide legal fees from forfeiture. The rationale for the court's ruling was plain, 814 F.2d at 909:

We hold that the Act was intended by Congress to permit such pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted to be paid as attorney fees, but that such an application violates the qualified right to counsel of choice secured by the sixth amendment. We further hold that the post-indictment ex parte restraints on property transfers, as permitted by the Act, violated fifth amendment procedural due process rights where no opportunity for an early post-restraint hearing is afforded but that here the error of entering such an order was harmless and, in any event, no basis for reversing the conviction.

Harvey quite clearly concluded that legitimate, arms length, legal fees intended for the defense of criminal





charges are protected by the Constitution,  
814 F.2d at 926:

In sum, we hold that to the extent the Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice.

The Harvey analysis comfortably resolves the conflict, found in the instant case, between a defendant's constitutional right to counsel, due process, and fundamental fairness, on the one hand, and the government's broad interest in crime prevention, on the other hand. In the pretrial context, at a time when the accused is presumed innocent and is entitled to the benefit of counsel to mount a vigorous defense to the criminal allegations, the balance properly rests



with the accused, such that assets needed to mount a defense or pay legal fees "may constitutionally be forfeited or restrained from transfer only when and to the extent the fee transaction was a sham or fraudulent one..." Id. at 929. The government interest is satisfied under this analysis, because the government is entitled to seek the restraint and forfeiture of assets involved in sham transactions and also is empowered to demonstrate that sufficient untainted resources exist which are adequate to satisfy the demands of the attorney-client relationship. Id. at 927-928.

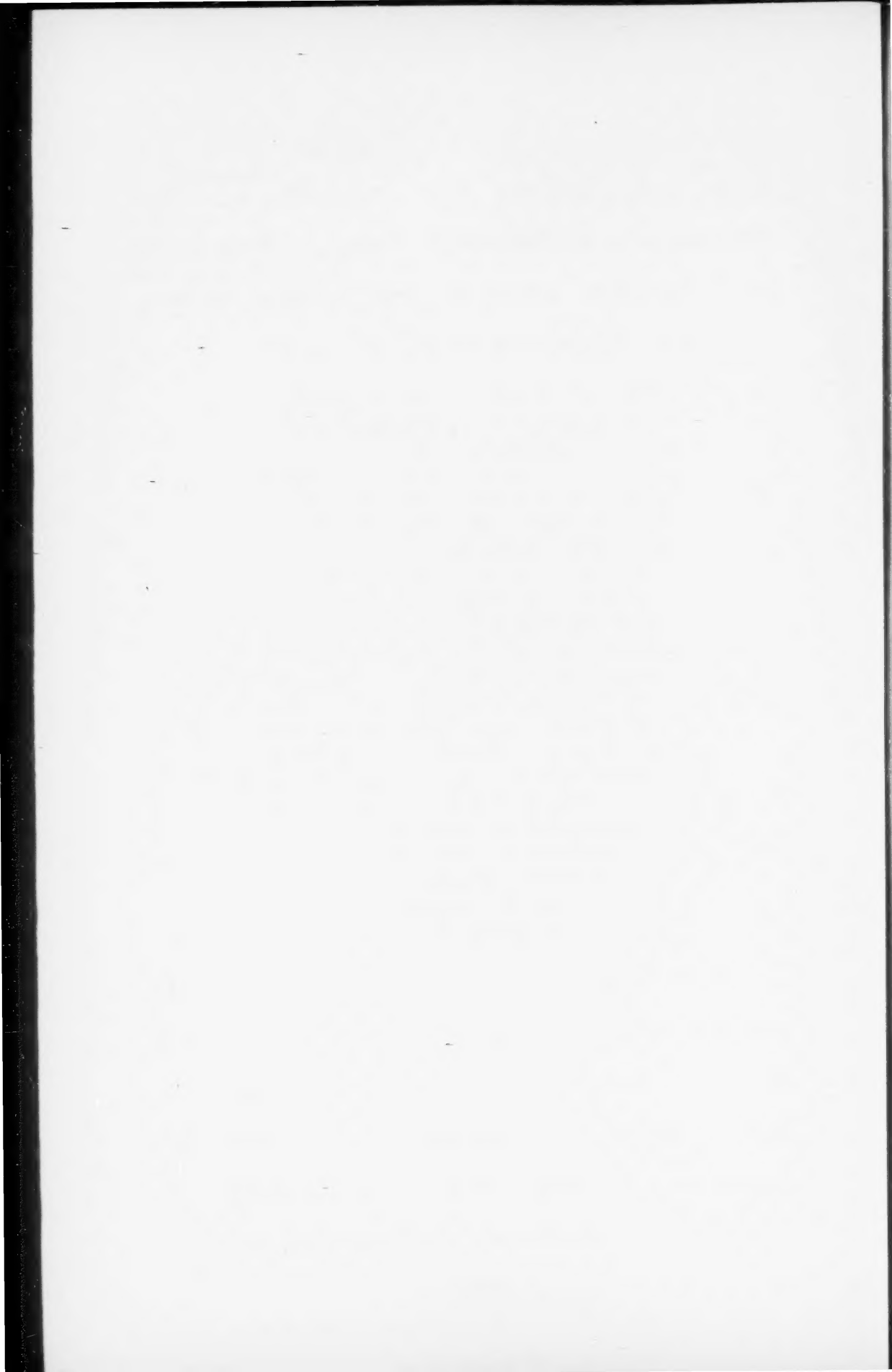
Another appellate decision which conflicts with the Ninth Circuit case under review is United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), on rehearing, 809 F.2d 249 (5th Cir. 1987), where the Fifth Circuit invalidated a pretrial



order prohibiting the payment of the defendant's attorneys' fees. Reversing the district court's restraining order, the Fifth Circuit stated, at 1474:

We agree with the Bassett, Ianniello, Reckmeyer, Badalamenti, and Rogers courts that the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services.... We see no indication in the statute or legislative history that Congress intended to exclude attorneys from bringing a third-party claim for a reasonable attorney fee against potentially forfeitable assets in a post-conviction hearing.

In so holding, the court noted that it was not establishing a blanket prohibition against similar pretrial restraints. There exist two potential avenues for district courts when addressing the question of pretrial restraining orders:



(1) an attorney fee exemption from pretrial restraint; or (2) a post-conviction hearing where counsel could line up with other creditors and demonstrate the bona fide nature of the claim for legal fees.<sup>16/</sup> Choosing a particular alternative requires a balancing of interests:

Defendant's interest in obtaining counsel of choice and the possible adverse effects of a pretrial refusal to exempt defense counsel's fees from forfeiture are factors that the district court must consider in exercising its discretion to grant a pretrial injunction that restrains the defendant's assets until conclusion of trial.

Pretrial seizure of assets needed for defense of criminal charges places the defendant in a difficult quandary. How can the defendant prevail against the

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<sup>16/</sup> See also United States v. \$10,694, 828 F.2d 233 (4th Cir. 1987) (subjective knowledge requirement in civil forfeiture).





charges if the government deprives him of the tools needed to accomplish that? How does the defendant prove that the resources to pay counsel should not be restrained because they are from legitimate sources? Even when that is done, as shown in the present case, can a court order still deprive the defendant of access to the property, and thus deny the ability to pay counsel? The gain to the government merely by engaging in a pretrial seizure of assets or obtaining a restraining order is that the accused is left powerless to defend against the charges. The Ninth Circuit's allowance of that result severely conflicts with the constitutional principles discussed herein.

Constitutional considerations of due process guarantee that criminal proceedings will be fundamentally fair.



See Estelle v. Williams, 425 U.S. 501, 505 (1976); Powell v. Alabama, 287 U.S. 45, 63 (1932). Allowing the pretrial seizure and restraint of assets needed to pay legal defense expenses denies due process to the accused. The Rogers court recognized this danger when it exempted legal fees from the ambit of statutory forfeitures. 602 F.Supp. at 1350.

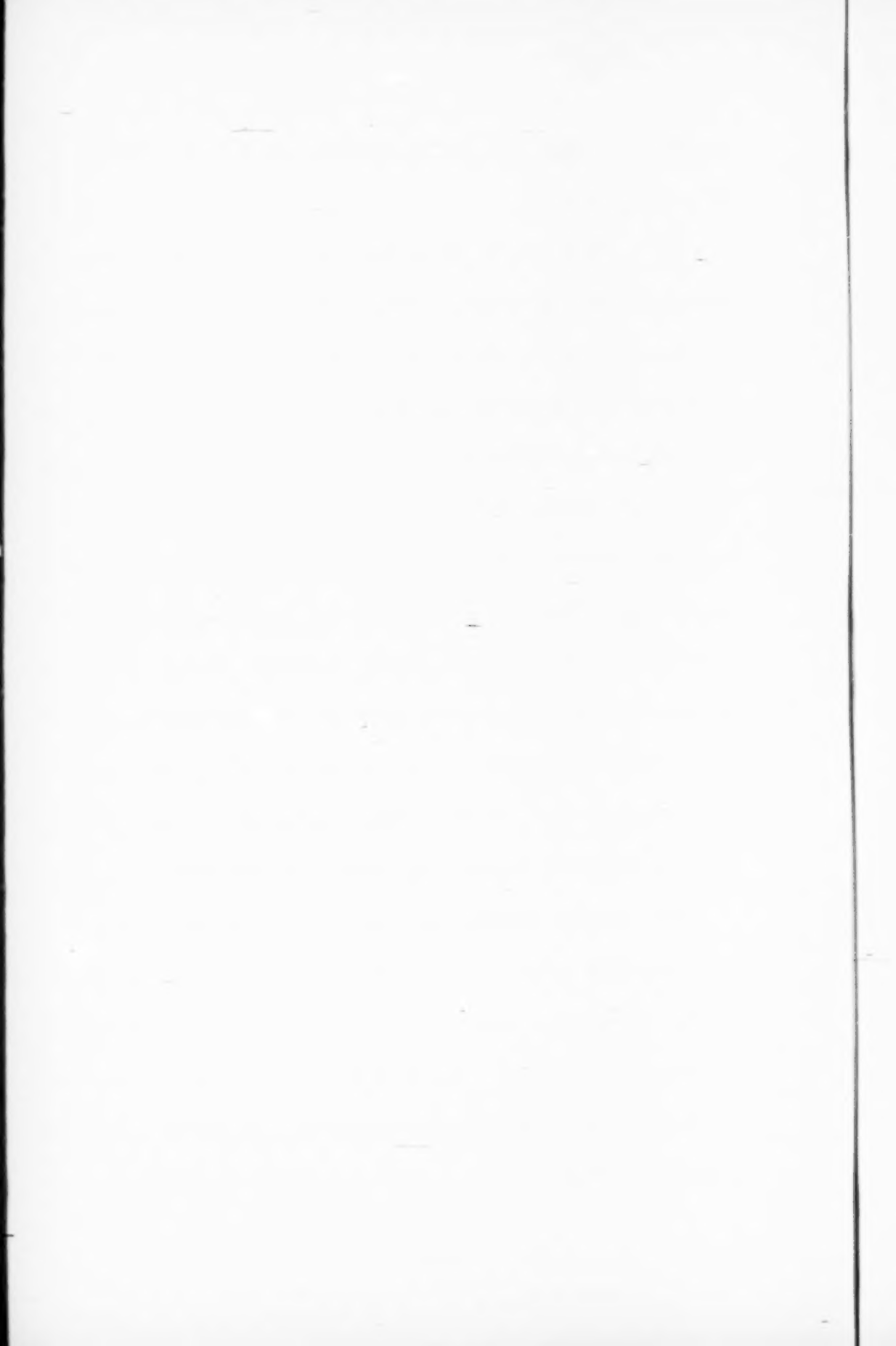
Our system of justice is predicated on the reality that the vigorous assertion of a defendant's rights "will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronin, 466 U.S. 648, 104 S.Ct. at 2045 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)). The government's interest in barring the use of assets for the defendant's defense simply cannot outweigh the constitutional preference for liberty until guilt is



certain. See In re Winship, 397 U.S. 358, 362-64 (1970).

Our adversary system demands that the government prevail only by proving its allegations, not by undercutting an accused's ability to mount a defense. In the former situation, the public perception is that trials are fair. In the latter case, the public will come to question the integrity of our justice system. Our courts have worked hard for generations to foster public acceptance of the rule of law. Forfeiture of fees is inconsistent with the fairness which people expect from our justice system.

The NACDL supports the efforts to take the profit out of crime. The approach used, however, must be consistent with our constitutional system of justice. Restraining a defendant's assets is incompatible with these constitutional



considerations. By enabling the government to restrain assets and thus prevent effective representation by counsel, the Ninth Circuit favored the enormous power of the government against an unprotected defendant. Where fundamental liberties are at stake, as in the pretrial seizure and restraint of assets, the government interest must be deemed secondary.

The decision of the Ninth Circuit has altered the delicate balance between law enforcement interests and an accused's right to challenge government accusations. The result reached by the Ninth Circuit undermines the beneficial policy underlying the right to effective assistance of counsel. The Ninth circuit decision threatens the uniformity necessary for the effectuation and application of the criminal laws in just manner.





**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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